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Davis Wright Tremaine LLP
LAW OFFICES

Suite 700 • 1155 Connecticut Avenue, N.W. • Washington, D.C. 20004
(202) 508-6600 • Fax: (202) 508-6699
Website: <http://www.dwt.com>

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Richard L. Cys
(202) 508-6617

January 6, 1997

William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: In the Matter of Implementation of the Telecommunications Act
of 1996 Amendment of Rules Governing Procedures
to Be Followed When Formal Complaints Are Filed
Against Common Carriers, CC Docket No. 96-238

Dear Sir:

Enclosed for filing on behalf of NEXTLINK Communications, L.L.C. are Comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned matter. An original and nine copies are included for distribution to the Commissioners.

In addition, we are submitting today two additional copies with cover letter to the Common Carrier Bureau, Enforcement Division, one copy to International Transcription Services, Inc., and a copy of this letter and the comments on 3.5" WordPerfect 5.1 read only diskette to Anita Cheng, Common Carrier Bureau, Enforcement Division.

Please date stamp and return to the messenger the copy of this cover letter.

Sincerely,



Richard L. Cys

Counsel for NEXTLINK
Communications, L.L.C.

RLC/ck
Enclosures

No. of Copies rec'd
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William F. Caton

January 6, 1997

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cc: Common Carrier Bureau
Enforcement Division
Federal Communications Commission
2025 M Street, N.W., Room 6008
Washington, D.C. 20554
(cover letter and two hard copies)

Anita Cheng
Common Carrier Bureau
Enforcement Division
Federal Communications Commission
2025 M Street, N.W., Room 6008
Washington, D.C. 20554
(cover letter and diskette)

International Transcription Services, Inc.
2100 M Street, N.W. Suite 140
Washington, D.C. 20037
(one hard copy)

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FCC 96-460

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of)	
)	
Implementation of the)	CC Docket No. 96-238
Telecommunications Act of 1996)	
)	
Amendment of Rules Governing)	
Procedures to Be Followed When)	
Formal Complaints Are Filed)	
Against Common Carriers)	
_____)	

COMMENTS OF NEXTLINK COMMUNICATIONS L.L.C.

NEXTLINK COMMUNICATIONS L.L.C.
J. Scott Bonney, Vice President
Regulatory and External
Affairs
Alaine Miller, Director
Regulatory & Public Policy
155 108th Ave., N.E.
Bellevue, Washington 98004
(206) 519-8905

DAVIS WRIGHT TREMAINE
Daniel M. Waggoner
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98101
(206) 622-3150

Richard L. Cys
1155 Connecticut Ave., NW
Suite 700
Washington, D.C. 20036
(202) 508-6600

Attorneys for NEXTLINK
Communications L.L.C.

January 6, 1997

SUMMARY

NEXTLINK Communications, L.L.C. ("NEXTLINK") is a facilities-based competitive local exchange carrier financed without the use of captive rate payor funds that competes with incumbent local carriers in a number of localities around the country. NEXTLINK respectfully submits these comments regarding the Commission's proposed revisions to its formal complaint procedures. While NEXTLINK generally supports the Commission's proposals in its Notice of Proposed Rulemaking ("NPRM") to streamline and expedite procedures when formal complaints are filed against common carriers, it believes that additional safeguards are needed to protect fully the interests of emerging competitors such as NEXTLINK.

Based upon its experiences thus far in entering new markets, NEXTLINK is concerned that the Commission's proposed rules will not provide for the speedy and efficient resolution of disputes that are likely to arise between new competitors such as NEXTLINK and incumbent carriers. For example, the Commission's rules for interconnection govern not only price and financial issues, but also technical and operational interfaces. Interpretation of the precise meaning of interconnection agreements and resolving disputes about the feasibility of interconnecting will therefore require technical expertise. Likewise, NEXTLINK anticipates that many technical issues will arise in determining whether a Bell Operating Company continues to meet any of the conditions required for approval to provide interLATA service under

Section 271(c)(2)(B) of the Telecommunications Act of 1996.

Finally, NEXTLINK's experience is that potential defendant carriers have far greater access to the facts giving rise to complaints than do potential claimants, so that limited discovery should be allowed.

Consequently, NEXTLINK believes that the Commission's proposed rules should be modified in two respects:

- Potential complainants should have an opportunity to approach FCC staff in advance of filing a complaint to attempt to resolve the disputed issues through mediation implemented pursuant to the Administrative Dispute Resolution Act of 1990; and
- At least limited self-executing discovery should be afforded because the facts surrounding complaints are not equally accessible to a potential claimant and a potential defendant carrier.

A. The Commission Should Provide for Access to Staff Members to Serve as Mediators Before Complaints are Filed.

1. The Commission has specifically requested comment on "whether a Committee composed of neutral industry members would serve a needed role or useful purpose in addressing disputes over technical and other business disputes, before such disputes are brought before the Commission in the form of formal complaint actions that must be resolved under expedited procedures." NPRM ¶ 29. While in agreement with the use of mediation to resolve disputes, NEXTLINK believes that Commission staff rather than

industry representatives should be available upon request to act informally as mediators before a complaint is filed.

Informal dispute resolution procedures are more successful if the presiding officer is cloaked with at least quasi-judicial authority. For this reason, courts often use magistrates or commissioners to conduct mediation proceedings because those individuals are vested with at least some judicial powers. By analogy, because Commission staff have regulatory authority over the matters that will be adjudicated in the complaint process, they will predictably have greater persuasive effect upon the parties than private individuals. Mediation conferences conducted by staff are simply more likely to produce positive results, and the attendant savings of time and expense to be expected in mediation, than proceedings before private industry representatives.

Moreover, NEXTLINK anticipates that disputes to be adjudicated in the complaint process will often involve complex technical issues. For example, problems will inevitably arise with compliance with the terms of arbitrated interconnection agreements. These contracts are often the result of lengthy and protracted negotiations and arbitrations. Interpreting the technical aspects of these agreements and their precise requirements will require participation by individuals with experience and knowledge of the industry. The same is true of allegations that interconnection in a particular location or manner is technically impossible or that a BOC is no longer

meeting the requirements of the "competitive checklist" requirements of Section 271(c)(2)(B) of the Act. Commission staff has the requisite expertise and practical working knowledge of the industry to facilitate discussions between the parties, especially about technical issues, the interconnection process and the requisites of the "competitive checklist."

2. NEXTLINK's proposal to involve Commission staff in early resolution of complaints is consistent with the goals articulated in the NPRM. As the Commission has stated:

One of the main goals of this rulemaking is to implement requirements that encourage potential parties to resolve their differences prior to adjudication before the Commission. Encouraging parties to resolve their differences in advance will decrease the likelihood that the parties will need to file formal complaints. To the extent such settlement efforts fail or are otherwise impractical, the proposed rules are designed to insure diligence by complainants and defendants in presenting their respective claims to the Commission.

NPRM at ¶ 21 (emphasis added).

3. NEXTLINK suggests that the Commission implement the mediation procedures under the auspices of the Administrative Dispute Resolution Act of 1990 and that the Commission impose appropriate time limits on the mediation process. 5 U.S.C. §§ 571-583. The Administrative Dispute Resolution Act allows for voluntary dispute resolution by neutral persons who may be Federal Government employees and who are acceptable to the parties. 5 U.S.C. § 573(a). This approach is consistent with the provision of the Telecommunications Act of 1966 allowing for

State Commissions upon request to mediate differences arising in the course of negotiating interconnection agreements. 47 U.S.C. § 252(a)(2). Several state commissions have developed mediation procedures to assist with the negotiation process. Similarly, ADR is being utilized frequently by federal district courts in implementing the Civil Justice Reform Act of 1990. 28 U.S.C. §§ 471-482. See ADR and Settlement in the Federal District Courts (joint project of the Federal Judicial Center and the CPR Institute for Dispute Resolution) (1966).

4. In the event that FCC staff cannot be available, presumably because of the press of other business, then as an alternative NEXTLINK would agree with the proposal that a panel of neutral experts from the industry be available as mediators to substitute for FCC staff. For the same reasons discussed above, it will be important that these individuals have broad industry experience and knowledge.

B. Limited, Self-Executing Discovery Should Be Allowed.

5. The Commission's rules assume that the parties have equal knowledge of the facts relating to particular complaints, but in practice that is not the case. In NEXTLINK's experience with interconnection negotiations, for example, incumbent carriers often do not provide information about their negotiating positions beyond asserting that they cannot fulfill a particular request. NEXTLINK has encountered refusals to provide interconnection in particular instances on the grounds that it is not technically possible but without any explanation of the

reasons for the alleged impossibility. When disputes such as this arise, the complaining party simply will not have access to the information needed to support fully its complaint. Consequently, it is imperative that there be some discovery available to complainants.

6. Specifically, NEXTLINK urges that the Commission not eliminate self-executing discovery as proposed in paragraph 50 of the NPRM. Rather, NEXTLINK encourages the Commission, as suggested in paragraph 51, to provide for limited discovery on an expedited basis. That is the only way to achieve equal access to required information. NEXTLINK suggests that complainants be allowed limited discovery by way of both depositions and interrogatories with precise limits to be developed as procedural rules are drafted.¹ Defendant carriers would be required to provide this discovery within 20 days after filing an answer.

7. NEXTLINK notes that its proposal to allow for limited discovery as of right is inconsistent with the Commission's proposal to require submission of a joint statement of stipulated facts and key legal issues five days after the answer is filed. NPRM ¶ 80. NEXTLINK suggests that this proposal be modified to allow for filing the joint statement five business days after discovery is completed in those cases where discovery is taken.

¹ NEXTLINK proposes that complainants be allowed 30 interrogatories without subparts and up to five depositions as of right.

8. NEXTLINK endorses the Commission's proposal to amend its rules to require that, "unless otherwise ordered by the staff, an initial status conference take place in all formal complaint proceedings ten business days after the defendant files its answer to the complaint." NPRM ¶ 58 (footnote omitted). NEXTLINK agrees with the Commission that early intervention in this manner is likely to lead to settlement of more cases as well as narrowing of the issues. In light of its proposal for limited, self-executing discovery, however, NEXTLINK suggests that a status conference take place 30 days after an answer is filed, thereby allowing for completion of discovery within 20 days of filing an answer.

Dated this 6th day of January, 1997.

Respectfully submitted,

DAVIS WRIGHT TREMAINE

By Richard L. Cys
Daniel M. Waggoner
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98101
(206) 622-3150

Richard L. Cys
1155 Connecticut Ave., NW
Suite 700
Washington, D.C. 20036
(202) 508-6600

Attorneys for NEXTLINK
Communications L.L.C.

Of Counsel:

NEXTLINK COMMUNICATIONS L.L.C.
J. Scott Bonney, Vice President
Regulatory and External
Affairs
Alaine Miller, Director
Regulatory & Public Policy
155 108th Ave., N.E.
Bellevue, Washington 98004
(206) 519-8905